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See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 11/22/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

WARREN SANDERSON,)	No. 1 CA-IC 11-0016
)	
Petitioner Employee,)	DEPARTMENT B
)	
v.)	MEMORANDUM DECISION
)	
THE INDUSTRIAL COMMISSION OF)	(Not for Publication -
ARIZONA,)	Rule 28, Arizona Rules
)	of Civil Appellate
Respondent,)	Procedure)
)	
O'REILLY AUTO PARTS,)	
)	
Respondent Employer,)	
)	
HARTFORD CASUALY INSURANCE)	
COMPANY,)	
)	
Respondent Carrier.)	
)	

Special Action - Industrial Commission

ICA Claim No. 20092-380114

Carrier Claim No. 002432-009260-WC-01

The Honorable Layna Taylor, Administrative Law Judge

AWARD AFFIRMED

Hendrickson & Palmer, P.C.
By Adam P. Palmer
Attorneys for Petitioner Employee

Phoenix

K E S S L E R, Judge

¶1 This is a special action review of an Industrial Commission of Arizona ("ICA") award and decision upon review for a non-compensable claim. Petitioner employee ("Claimant") raises three issues on appeal:

- (1) whether the administrative law judge ("ALJ") erred by failing to make a specific credibility finding with regard to the lay witnesses' testimony;
- (2) whether the ALJ erred by failing to apply the "unexplained injury presumption"; and
- (3) whether Dr. Powers's medical opinion was foundationally inadequate to support the award.

Because we find the ALJ's conclusion that Claimant's injury was the result of an idiopathic fall supported by the evidence of record, we affirm.

JURISDICTION AND STANDARD OF REVIEW

¶2 This court has jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(2) (2003), 23-951(A) (1995), and Rule 10, Arizona Rules of Procedure for Special Actions. In reviewing findings and awards of the ICA, we defer to the ALJ's factual findings, but review questions of law *de novo*. *Young v. Indus. Comm'n*, 204 Ariz. 267, 270, ¶ 14,

63 P.3d 298, 301 (App. 2003). We consider the evidence in a light most favorable to upholding the ALJ's award. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16, 41 P.3d 640, 643 (App. 2002).

PROCEDURAL AND FACTUAL HISTORY

¶3 On July 28, 2009, Claimant was working as a delivery driver for the respondent employer, O'Reilly Auto Parts. He had an accident at 8:15 a.m. and was found bleeding and unconscious on the floor shortly thereafter by a coworker. He testified that he had no memory of his injury or of the following three weeks during which he was hospitalized.

¶4 Several weeks after his injury, Claimant filed a worker's report of injury. The respondent carrier, Hartford Casualty Insurance Company, denied his claim for benefits. Claimant timely requested a hearing, and two ICA hearings were held to receive testimony from Claimant, his wife, a coworker, a private investigator, and two physicians.

¶5 Claimant testified that on the date of his injury, he arrived for work at 7:30 a.m. and felt fine. He stated that prior to this injury, he had no history of fainting, falling, or forgetfulness. Claimant did testify that several weeks before his injury, he was diagnosed with prostate cancer and began treatment with Dr. Maggass. The doctor had given him one

injection of a cancer drug, Lupron, on July 6, 2009, but he had not experienced any side effects. Claimant testified that he also takes cholesterol medication and some over-the-counter medications, but he had not experienced any side effects from any those prior to this accident. Claimant stated that since this injury, he has experienced short-term memory loss, hand tremors, difficulty focusing and walking straight, low energy, and a loss of hearing in his left ear.¹

¶16 Claimant's supervisor, Richard Lake, testified that Claimant was a good employee and they had a good working relationship. He testified that Claimant was found after his injury by a sales associate, Candita Lott. She did not witness the fall, but she heard it. Lake stated that by the time he walked to the back of the store, Claimant was trying to get up and he was bleeding from his head and shoulder. Lake testified that Claimant told him that he had felt faint and then passed out. He stated that the aisle where Claimant's accident occurred was six-feet wide with nothing that would have caused him to trip and fall. Finally, Lake testified that he and Lott stayed with Claimant until the paramedics arrived.

¶17 James Lawson, a private investigator, testified that he performed a scene investigation at O'Reilly and interviewed

¹ Claimant's wife provided consistent testimony.

the witnesses. Although Lott was not present for the ICA hearing, Lawson interviewed her. Lott told him that she arrived at O'Reilly on July 28, 2009, at 6 a.m. to open. She stated that she saw Claimant when he arrived for work, approximately 15 to 30 minutes before the accident, and he appeared to be fine. When Claimant spoke to Lott immediately after his accident, he told her that he had felt dizzy and leaned against a set of plastic drawers to steady himself.

¶18 Lawson was questioned about the following portion of his report:

I did meet with Mr. Lake and found him to be suspect in his credibility. Initially, he told me in our interview that when he first saw Mr. Sanderson [Claimant], he was laying on the ground. I asked Mr. Lake if he could lie in the position in which he found Mr. Sanderson on the floor. He then placed himself in that position as I obtained video and photos. However, later in the interview, Mr. Lake admitted that he never really saw Mr. Sanderson on the floor. By the time he got to the back aisle, Mr. Sanderson was sitting upright. Additionally, Mr. Lake stated that Ms. Lott came running from the back saying that Mr. Sanderson and [sic] fallen and asked him what she should do. According to his statement, Mr. Lake said he instructed Ms. Lott to call '911'. Considering that Ms. Lott claimed (during her statement) that she was a former CNA and triage nurse, I believe she would know to call '911'. In her statement, she said that when she shouted aloud that 'Warren' had fallen, Mr. Michael Ripley replied that he was calling '911'.

At the ICA hearing, Lawson explained that he no longer had any reservations about Lake's credibility. He explained, "I think he was unsure of the exact questions that I was asking him and I

probably didn't take enough time to explain some of the questions that he answered partially correct."

¶9 Kan Yu, M.D., Ph.D., a board-certified neurologist with a Ph.D. in physiology, testified that he saw Claimant on February 8, 2010. He received a history of Claimant's faint and fall. The doctor stated that he had reviewed Claimant's industrially-related medical records, reports, and diagnostic tests. Dr. Yu testified that Claimant sustained a traumatic brain injury in the fall, which required a neurosurgical evacuation at Good Samaritan Hospital in August 2009. He stated that Claimant denied having any warning signs before he fainted, such as dizziness, and denied any history of dizziness or fainting before or since the incident. Claimant reported residual neurological conditions from his fall including headaches, balance and memory problems, and generalized weakness.

¶10 Dr. Yu performed a neurological examination that revealed very mild balance issues and some short-term memory difficulties. He diagnosed syncope² of unknown etiology and a closed head injury. He stated that Claimant's CT and MRI scans showed a subdural hematoma and a subarachnoid hemorrhage. It

² "[A] temporary suspension of consciousness due to generalized cerebral ischemia," i.e., deficiency of blood to the brain; "a faint or swoon." Dorland's Medical Dictionary 861, 1622 (28th ed. 1994).

was Dr. Yu's opinion that Claimant's residual symptoms on examination were related to the July 28, 2009 brain injury.

¶11 Dr. Yu was aware Claimant was treated by Dr. Maggass and had received a four-month Lupron injection on July 6, 2009. The doctor testified that according to the Physician's Desk Reference, one potential side effect of Lupron is syncope in five percent or less of patients. Dr. Yu noted that Dr. Maggass's report one week after the injection indicated that Claimant seemed to be tolerating the medication well.

¶12 John Michael Powers, M.D., a board-certified neurologist, testified that he regularly sees patients who have had syncopal episodes to try to ascertain the cause. He stated that syncope is caused by an insufficient blood supply to the brain, i.e., low blood pressure. The doctor testified that there are many potential causes including irregular heart rate, dehydration, or being overheated. Dr. Powers noted that Claimant has no recollection of the actual event, so he had to rely on the ambulance, paramedic, and hospital reports to obtain a history.

¶13 The paramedics reported finding Claimant on the ground bleeding from the back of his head and his back. Claimant reportedly told the paramedics that he became dizzy and fell at work. The Gilbert hospital, where Claimant first was seen,

recorded a history that Claimant was standing up at work, began to feel sweaty and dizzy, leaned over a set of rolling drawers, and then fell down. Good Samaritan Hospital recorded a similar history, but added that when Claimant fainted, he fell backwards and struck the back of his head. Dr. Powers explained that it made sense for Claimant to be able to provide an accurate history of his injury immediately after it occurred, but later, not to be able to remember what happened, because of the increasing pressure on his brain from the formation of blood clots.

¶14 Dr. Powers testified that his review of Claimant's records revealed no reason for him to have fallen down other than fainting. When he fell, Claimant struck the back of his head, which is typical for an individual who is unable to take any protective measures to break his fall. Dr. Powers testified that Claimant sustained a significant head injury from the fall. It was his opinion that Claimant fell on July 28, 2009, because he fainted.

¶15 Dr. Powers was unable to identify any work-related reason for the faint. With regard to causation, the doctor stated that it is fairly common to have difficulty identifying a cause. From the history that Claimant was light-headed and sweaty prior to fainting, Dr. Powers concluded that Claimant

experienced an episode of low blood pressure. He also stated that Claimant's Lupron injection potentially could be relevant to the faint. It was the doctor's opinion that multiple reasons contributed to Claimant's faint.

¶16 Following the ICA hearings, the parties filed post-hearing memoranda. The ALJ then entered an award for a non-compensable claim. Claimant timely requested administrative review, and the ALJ supplemented and affirmed her award. Claimant then filed this appeal.

DISCUSSION

¶17 Claimant first argues that the ALJ erred by failing to make a specific credibility finding as to the lay witnesses' testimony or by resolving the evidentiary conflicts among them. The ALJ is "the sole judge of witness credibility." *Holding v. Indus. Comm'n*, 139 Ariz. 548, 551, 679 P.2d 571, 574 (App. 1984). It is her duty to resolve all conflicts in the evidence and to draw all warranted inferences. See *Malinski v. Indus. Comm'n*, 103 Ariz. 213, 217, 439 P.2d 485, 489 (1968). But an ALJ is not required to make a specific finding on every disputed factual issue, as long as she resolves the ultimate issues. See, e.g., *Cavco Indus. v. Indus. Comm'n*, 129 Ariz. 429, 435, 631 P.2d 1087, 1093 (1981).

¶18 In this case, the ultimate issue was whether Claimant's injury arose out of his employment such that he had sustained a compensable industrial injury. When the cause of an injury is not clear to a lay person, expert medical evidence is required. *Western Bonded Prods. v. Indus. Comm'n*, 132 Ariz. 526, 527, 647 P.2d 657, 658 (App. 1982). In that regard, the ALJ found:

10. On review, the applicant asserts that a finding of witness credibility is essential to this case. The prior decision in this matter was based on the medical evidence and the applicant's own statements to emergency and hospital personnel, since the applicant had no memory of the events surrounding his injury at the time he testified. Both doctors concluded that the applicant sustained a syncopal episode in which he fainted and fell. That episode is not 'unexplained', as asserted by the applicant; but is in fact explained by the applicant's statements to emergency and hospital personnel. Dr. Powers noted that the severity of the injury in a ground level fall is consistent with the applicant being unconscious and unable to make any effort to break his fall with his hands and arms. The credibility of other lay witnesses is not relevant to those findings.

We believe that this finding is sufficient, and the ALJ was not required to make additional findings regarding the lay witnesses.

¶19 Claimant next argues that the ALJ erred by failing to apply the unexplained injury presumption from *Hypl v. Industrial Commission*, 210 Ariz. 381, 111 P.3d 423 (2005). A claimant has the burden of proving all elements of a compensable claim.

E.g., Toto v. Indus. Comm'n, 144 Ariz. 508, 512, 698 P.2d 753, 757 (App. 1985). To be compensable, an injury must arise out of and in the course of employment. See A.R.S. § 23-1021(A) (Supp. 2011). "Arising out of" refers to the origin or cause of the injury, while "in the course of" refers to the time, place, and circumstances of the injury in relation to the employment. *Peter Kiewit Sons' Co. v. Indus. Comm'n*, 88 Ariz. 164, 168, 354 P.2d 28, 30 (1960); *Scheller v. Indus. Comm'n*, 134 Ariz. 418, 420, 656 P.2d 1279, 1281 (App. 1982).

¶20 Claimant's fall satisfied the time, place, and circumstances of the course of employment element of compensability. To meet the "arising out of" element, the injury must have been the result of "some risk inherent in the employment or incidental to the discharge of the duties thereof." *Royall v. Indus. Comm'n*, 106 Ariz. 346, 349, 476 P.2d 156, 159 (1970). In that regard, Claimant argues that the ALJ erred by failing to apply either the unexplained fall or unexplained injury doctrine to satisfy the "arising out of" element.

¶21 Unexplained falls and idiopathic falls are distinct causes of injury. An idiopathic fall arises from some condition personal to the claimant, such as a preexisting illness. See 1 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation*

Law ("Larson") § 9.01[1] (2009). Therefore, it is a personal risk that does not arise out of employment, unless the employment contributes to the risk or aggravates the injury. *Id.*; *Arizona Workers' Compensation Handbook* § 3.3.5 (Ray J. Davis et al., eds., 1992 and Supp. 2010).

¶22 In contrast, an unexplained fall arises from an unknown cause or from a cause that can be attributed neither to the claimant personally nor to the employment. See *Larson*, § 7.04[1]. An explained fall is rebuttably presumed to arise out of employment, if the fall occurred in the course of employment. See *Arizona Workers' Compensation Handbook* § 3.3.4; see also *Circle K Store No. 1131 v. Indus. Comm'n*, 165 Ariz. 91, 95-96, 796 P.2d 893, 897-98 (1990) (recognizing and applying the unexplained fall presumption).

¶23 Claimant contends that the ALJ erred by failing to recognize that he sustained an unexplained fall and was entitled to receive the rebuttable presumption first recognized in *Hypl*. The law does not support his argument. Idiopathic falls include falls that are the result of a "nonoccupational heart attack, epileptic fit, or fainting spell." *Larson*, § 9.01[1] (emphasis added). The general rule is that the effects of these falls are non-compensable unless "the employment places the employee in a position increasing the dangerous effects of such a fall, such

as on a height, near machinery or sharp corners, or in a moving vehicle." *Id.*; Compare *PMC Powdered Metals Corp. v. Indus. Comm'n*, 15 Ariz. App. 460, 463-64, 489 P.2d 718, 721-22 (1971) (upholding compensability where faint preceded a fall off of an eight-foot ladder), with *Valerio v. Indus. Comm'n*, 85 Ariz. 189, 191-92, 334 P.2d 768, 769-70 (1959) (determining compensability was properly denied where an epileptic seizure preceded a fall onto a level concrete floor).

¶24 In *Hyp1*, after the claimant was observed driving erratically on Interstate 10, he was arrested and taken to a police station, where it was discovered that he had a skull fracture. 210 Ariz. at 383, ¶¶ 2-3, 111 P.3d at 425. The claimant was taken to a hospital for emergency surgery. *Id.* At the ICA hearing, following denial of his workers' compensation claim, the claimant testified that he remembered loading his truck and driving toward Interstate 10, but then had no additional recollection until he awoke from a coma following his surgery. *Id.* at ¶ 4. The court held that:

a presumption similar to the unexplained death presumption should apply to an injury to a living worker who, due to the injury, is unable to testify about how the injury happened. Thus, an injured worker who proves by a preponderance of the evidence that he or she is unable to remember or to communicate the circumstances and cause of an injury due to the injury and who proves by a preponderance of the evidence that the injury occurred during the time and space limitations of the employment is presumed to have been

injured while doing the employer's work, i.e., in the course of the employment, and the injury is presumed to have arisen from the employment in the absence of evidence that the worker was not within the course of the employment or that the injury did not arise from the employment.

Id. at 387, ¶ 20, 111 P.3d at 429.

¶25 As with other presumptions, the unexplained injury presumption only applies in the absence of evidence sufficient to permit a reasonable contrary inference. In this case, Claimant's fall was not unexplained. He provided a history of feeling dizzy and fainting to both lay and medical witnesses following his injury. The medical evidence established that he fell backwards because he fainted and he took no action to break his fall and struck the back of his head on the concrete floor causing a brain injury. The inability to state with any certainty what caused Claimant to faint, provided it was not arising out of his work duties, does not make the fall or the injury unexplained.

¶26 Claimant last argues that Dr. Powers's opinion lacked adequate foundation and was legally insufficient to support the award. The basis for this argument is that no one witnessed Claimant's accident, and neither doctor was able to state with certainty the cause of the faint.

¶27 A medical opinion must be based on findings of medical fact, which come from the claimant's history, medical records,

diagnostic tests, and examinations. See *Royal Globe Ins. Co. v. Indus. Comm'n*, 20 Ariz. App. 432, 434, 513 P.2d 970, 972 (1973). It is not necessary for a doctor to have positive knowledge of causation for his opinion to have value as evidence. *Harbor Ins. Co. v. Indus. Comm'n*, 25 Ariz. App. 610, 612, 545 P.2d 458, 460 (1976). Although "medical testimony can be so weakened by proof of an inaccurate factual background that the testimony cannot be said to constitute 'substantial evidence,'" that did not occur here. See generally *Desert Insulations, Inc. v. Indus. Comm'n*, 134 Ariz. 148, 151, 654 P.2d 296, 299 (App. 1982).

¶28 Dr. Powers reviewed all of the available information regarding Claimant's injury and treatment and testified that he could reasonably conclude that Claimant experienced low blood pressure that caused him to faint. We do not believe that the inability to identify a particular reason for the instance of low blood pressure prevented Dr. Powers from stating a legally sufficient opinion.

CONCLUSION

¶29 Because the evidence in the record supports the ALJ's award and decision upon review, we affirm.

/S/
DONN KESSLER, Judge

CONCURRING:

/S/
MARGARET H. DOWNIE, Presiding Judge

/S/
PETER B. SWANN, Judge